

A Few Reflections on the Model Penal Code Commentaries

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When Deborah Denno invited me to participate in the panel of the Association of American Law Schools discussing possible revision of the Model Penal Code, I initially declined, not having taught criminal law for more than two decades and having written only sporadically in the field. Professor Denno urged that as one involved in the revision of the Commentary, I might nonetheless have something to contribute. In these reflections, as at the session, I have mainly restricted myself to the relationship between the final commentary and the Code itself.

As Gerard Lynch's essay explains,¹ the Model Penal Code was the fruit of work during the 1950s, and its intellectual roots can be traced back to the late 1930s when Herbert Wechsler and Jerome Michael, in *A Rationale of the Law of Homicide*, developed a systematic utilitarian approach to that central aspect of the criminal law.² Other scholars made very considerable contributions, but the Model Code was decidedly the product of Professor Wechsler's vision. Although he was a utilitarian,³ his utilitarianism was highly nuanced, encompassing not only multiple reasons for condemnation and punishment, but the fundamental idea that no criminal code should drift too radically from the public's sense of wrongful behavior and of degrees of wrongdoing. This sensitivity helps to explain why most provisions of the Code can, as Judge Lynch points out, fit a "just deserts" deontological approach to criminal liability.

As the sections of the Code proceeded through a highly distinguished Criminal Law Advisory Committee and the entire membership of the American Law Institute ("A.L.I."), they were accompanied by commentaries. These were fullest in respect to action, culpability, justification, excuse, accessorial liability, and other key portions of the General Part, as well as a few specific crimes, most notably the levels of homicide. For many specific crimes and matters such as jurisdiction, the original commentary was thinner—not infrequently, much thinner. Scholars interested in seeing what any

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¹ Gerard Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 219 (2003).

² Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 1261 (1937).

³ I recall as a student in his criminal law class in the spring of 1961 suggesting after class that utilitarian considerations might be qualified by deontological concerns, an approach I had learned under H.L.A. Hart at Oxford. However he might have responded given more time and a fuller presentation, Wechsler then saw no merit in the position.

comments looked like when proposed sections were being considered by the A.L.I. can find out by consulting the Tentative Drafts.

The Model Code was approved formally in the spring of 1962, with the commentary in various stages of finality. During the following year, Wechsler became Executive Director of the A.L.I., undertaking a heavy burden of new responsibilities. However that job might otherwise have been conceived, he took an active part in the detail of all the codes and Restatements on which the organization was working. During the 1960s and 1970s, he was also involved in promoting practical criminal law reform, playing an especially important role in New York's revision. A painstaking writer of precision, elegance, and eloquence, Wechsler's gifts did not suit his turning out large amounts of commentary in the midst of all his other endeavors. The project of updating and completing the commentary bogged down.

During the late 1960s, Wechsler enlisted Peter Low to help revise the comments. Professor Low produced a substantial amount of work of high quality on the General Part. In the mid-1970s, the A.L.I. applied to the Law Enforcement Assistance Administration for a grant to complete the commentaries. With receipt of the grant began the final effort at completion, successful except for provisions regarding treatment and corrections, as to which the Code's approach had been largely overtaken by developments since 1962.

At this stage, the ambition for the comments had become not only to clarify exactly what various provisions were designed to accomplish, and to defend their approaches against possible alternatives, but also to explicate how the states and federal government had reacted in adopted and proposed revisions. By the period during which most of the new research was done, there had been over thirty completed revisions, and a number of proposed revisions were pending. Figuring out just what each of these provided with respect to a host of discrete particulars was not a simple matter.

Peter Low, as Reporter, and John Jeffries, as Associate Reporter, undertook the daunting task of covering all the specific crimes. Marvin Halberstam was Reporter for the preliminary subjects—such as territorial applicability, time limitations, and double jeopardy—covered by Article I. Sanford Fox was Associate Reporter for the two sentencing articles. I was to bring Low's work on the General Part up to date and review the contributions of the others. Although my formal title was Chief Reporter for Revision of the Commentaries, no one harbored any illusion about who was really the final editor. Herbert Wechsler participated powerfully through the project's life; he read everything carefully, and nothing appeared that did not have his approval. Given his authorship of much of the Code itself, this degree of involvement was not only appropriate, but fortuitous.

Our collective responsibility was to revise the comments. We had no authority to touch the content of the Code, and our work was not reviewed by the A.L.I. We did alter a few punctuation marks, and Professor Wechsler having been persuaded that the Code had engaged in blatant disregard of the "which-that" rule, I whiled away a

number of stimulating hours ferreting out “whiches” to convert to “thats.”⁴ But essentially we took the Code as given, a constraint that made perfect sense, since the 1962 Code had the authority of the whole American Law Institute, and states had been using it since that time.

These realities affected our approach to the comments we were revising. When extensive comments had preceded adoption of the Code provisions, providing explanations and justifications, we kept them with very little alteration, concentrating mainly on revisions following the Code and perhaps offering a few additional clarifications. When the original comments were sparing, as with much of Part II, the revisers had to be more creative. But even then, we almost always tried to provide a reasoned justification for what the Code did. We noted some scholarly developments after the 1950s, but our efforts in that respect were much more limited than our updating of practical developments in jurisdictions revising their criminal laws. Although the comments on sentencing did include a discussion of the movement toward “just deserts,” at no point did we try to address the whole Code’s merits and possible flaws against understandings that were heavily deontological, represented by writings such as John Rawls’s *A Theory of Justice* (1971), Ronald Dworkin’s *Taking Rights Seriously* (1977), and, in criminal law, George Fletcher’s *Rethinking Criminal Law* (1978). We rarely said explicitly that a Code provision was misconceived or seriously out of date. The acknowledgment that a gender neutral approach to sexual crimes might be preferable to the Code’s own, quoted by Professor Denno,⁵ was quite unusual.

Thus, our task was rather uncommon. Trying to describe practical developments fully and pay modest attention to new scholarship, we attempted during the late 1970s to give reasoned support for choices made two decades earlier. A reader of the comments provided for those sections for which the original comments had not been extensive must understand them as this strange hybrid. None of us, not even Wechsler, was attempting a reflective assessment of whether we, in the 1970s, would have adopted exactly what the Code provides.

I have little to add to what the other essayists say about possible revision in the near future. I agree with Professor Denno’s challenge to the provisions on sexual crimes, and I think Kenneth Simons has identified serious perplexities about the nuances of mental states.⁶ But Judge Lynch persuades me that for purposes of

⁴ My understanding is that if a phrase is parenthetical, “which” is appropriate; if the phrase is necessary to explain what object one is talking about, “that” should be used. Thus, “He stayed in his room, which was painted blue”; “he was able to choose among different balloons of various colors and picked the one that was blue.” Believing that because the “rule” was very widely not followed and the Code had been quoted for years with the misguided “whiches,” I opposed their extirpation, but I was overruled.

⁵ Deborah W. Denno, *Why the Model Penal Code’s Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 210 (2003).

⁶ Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179 (2003). I raise some problems with justification and accessorial sections in Kent Greenawalt, *A Vice of Its Virtues: The Perils of Precision in Criminal Codification, As Illustrated by Retreat, General Justification, and Dangerous Utterances*, 19 RUTGERS L.J. 929 (1988).

practical reform, attention is best directed at specific crimes that the Code omits altogether or treats in a manner that has ceased to be defensible.⁷ Lynch offers powerful reasons for pessimism about the prospects of comprehensive code reform. Criminal law scholars are much more divided about desirable approaches than they were in the 1950s, and even among centrist scholars, no one person now has the distinctive stature that Herbert Wechsler enjoyed. No doubt, improvements may be made in many of the Code's provisions, including those at its core, but whether a concentrated effort, with input from a number of scholars, would produce formulations that, overall, improve on the 1962 Code is doubtful. Paul Robinson and Michael Cahill make a strong argument about the possible political benefits of an updated authoritative code adopted by the A.L.I.;⁸ but my own sense is that that argument is not sufficient to justify a comprehensive reform of the Model Penal Code, rather than focused concentration on the specific crimes for which a modern treatment is urgently needed.

⁷ I put aside the provisions on sentencing, which the A.L.I. is already revising.

⁸ Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM L. 169 (2003).